No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

CANNELTON SEWER PIPE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA, PETITIONER

v.

GANNELTON SEWER PIPE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS BELOW

The District Court wrote no opinion. Its findings of fact and conclusions of law (R. 3-8) are not officially reported. The opinion of the Court of Appeals (App. A, *infra*, pp. 21-32) is reported at 268 F. 2d 334.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1959. (App. A, *infra*, p. 32.) By order

of Mr. Justice Clark, dated September 10, 1959, the time for petitioning for a writ of certiorari was extended to November 12, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Taxpayer, an integrated miner-manufacturer, mines fire clay and shale and, utilizing these minerals, manufactures sewer pipe and other finished products. There is an extensive market for fire clay and shale, but taxpayer does not sell on the mineral market; its mining costs are high and it would be unprofitable for taxpayer to do so.

Under the Internal Revenue Code, miners of designated minerals are entitled to a depletion allowance determined by applying a specified percentage to the taxpayer's gross income from "mining". "Mining" is defined as including "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products * * *."

The question presented by this case is whether the commercially marketable products, for purposes of determining taxpayer's allowance for mineral depletion, are fire clay and shale (the cut-off point for all non-integrated miners of these minerals) or whether, as held below, taxpayer may include in its gross income from "mining" the proceeds received from sale of sewer pipe and other finished products of its factories.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and Treasury Regulations are Sections 23(m) and 114(b)(4) of the Internal Revenue Code of 1939 and Section 29.23 (m)-1(f) of Treasury Regulations 111, printed in Appendix B, *infra*, pp. 33-38.

STATEMENT

Taxpayer, an Indiana corporation, has its principal place of business in southwestern Indiana (R. 4-5, 240). During the taxable year ended November 30, 1951, it was engaged in the mining of fire clay[1] and shale and in manufacturing those minerals (in 60-40 proportions) into vitrified sewer pipe, flue lining, wall coping and filter blocks. (R. 5.) During 1951, it mined 38,473 tons of fire clay and shale,[2] of which 60 percent (about 23,084 tons) was fire clay. It sold no raw fire clay or shale, except for 80 tons of clay and shale sold in ground form for $1,822.45

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[1] Fire clay, for which depletion is allowed at a 15-percent rate, is to be distinguished from brick and tile clay, for which only a 5-percent rate of depletion is allowed.

[2] The fire clay and shale which taxpayer mines is from a geological formation, generally called the Pennsylvania formation, which, in Indiana, is located in the southwestern part of the State extending northward. The same formation extends into Kentucky directly across the river from Cannelton, Indiana. (R. 48.) The fire clay in the formation is known as Pennsylvania underclay and lies directly beneath a thin layer of coal. (R. 5, 29, 146.) The shale, which is also a clay but contains some iron and is darker than fire clay when fired (R. 218), lies beneath the underclay (or fire clay). (R. 250).

(R. 5.) The remainder was used in manufacturing its finished products, the sales prices of which totalled $1,409,145.66. (R. 5.)

Fire clay and shale are used in the manufacturing of a variety of different products. In Indiana, for example, fire clay is used in making refractory brick, pottery, structural title, farm drain tile, face brick, sewer pipe, flue linings, conduit pipe and insulators. Shale is also used for most of those purposes, as well as in the production of cement and for paving brick and lightweight aggregate. (See Ex. A; R. 253.)

Fire clay and shale are sold in large quantities in their raw form (App. A, *infra*, p. 26). Thus, there were 31 states (including Indiana) in which fire clay was sold and purchased during 1951 and, of a total of 11,852,517 tons produced, more than one-fourth (3,159,667 tons) was sold rather than used by the producers thereof in making finished products from it. (See Minerals Yearbook (1951), Bureau of Mines, Department of the Interior, p. 294; see, also, R. 168; Ex. A, R. 252.)[3] Of the more than 500,000 short tons of fire clay produced in Indiana in 1951, over 300,000 tons were sold rather than used by the producers thereof. (App. A, *infra*, p. 27.) In that year, seven Indiana producers of fire clay and two Indiana producers of shale engaged in non-integrated operations—that is, strictly in the extraction of the raw fire clay and shale—and necessarily received

[3] The shale statistics, contained in the Minerals Yearbook, *supra*, p. 300, are included under the heading of "Miscellaneous Clays," of which 3.6 percent (989,739 tons) was sold in raw form.

depletion only on the raw fire clay and shale which they sold. (App. A, *infra*, pp. 26-27.)[4]

The District Court held that the taxpayer is entitled to take depletion on the total sales ($1,409,145.66) of its finished manufactured products, such as sewer pipe. (R. 6-7.) The Court of Appeals affirmed. Noting that taxpayer's costs are such that it could not profitably sell raw fire clay and shale, the court concluded that taxpayer has a different commercially marketable product than non-integrated members of the same mining industry and that it may take mineral depletion on the basis of the gross proceeds received from sale of its factory output. (App. A, *infra*, pp. 21-31.)

REASONS FOR GRANTING THE WRIT

1. The question presented is one which affects in very substantial degree the tax liabilities and the competitive situation of thousands of miners and miner-manufacturers. In our view, this is one of the most important tax cases presented to this Court in recent years.[5] The reasons which prompt this assertion may be stated as follows:

A. The issue decided by the court below is fundamental to the administration of the revenue provi-

[4] Directly across the river from taxpayer (in Kentucky), raw fire clay and shale were sold in substantial quantities to another sewer pipe manufacturer. (See R. 201-228.)

[5] The issue is discrete from that raised by the Government's petition in *United States* v. *Merry Brothers Brick & Tile Co.*, October Term, 1957, No. 220, certiorari denied, 355 U. S. 824. The relationship to that case is discussed *infra*, pp. 12-14.

sions relating to mineral depletion. What is at stake is ultimately this—May the deduction for depletion of mineral deposits, adopted on the theory that there should be an allowance for the exhaustion of a wasting asset, be converted into a prodigious tax benefit, available to selected taxpayers, for their *manufacturing* activities? The court has adopted a construction of the statute [6] which affords miner-manufacturers an opportunity to take extremely large deductions—in many instances, five, ten, and fifteen times what might otherwise be claimed [7]—which are not avail-

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[6] In *Commissioner* v. *Iowa Limestone Co.*, 269 F. 2d 398 (C.A. 8th), the Eighth Circuit subscribed to the same view of the statute. However, since that decision also rests on an independent ground (see p. 14, note, *infra*), we are not filing a petition in the *Iowa Limestone* case.

The decision below has also been followed by three District Courts. See *Standard Clay Manufacturing Co.* v. *United States* (W.D. Pa.), decided July 8, 1959 (4 A.F.T.R. 2d 5241), pending in the Third Circuit; *Dixie Fire Brick Co.* v. *United States* (N.D. Ala.), decided July 30, 1959 (4 A.F.T.R. 2d 5368), pending in the Fifth Circuit; *Victorville Lime Rock Co.* v. *Riddell* (S.D. Cal.), decided July 27, 1959 (4 A.F.T.R. 2d 5463), pending in the Ninth Circuit.

Three other cases are now pending on Government appeals to two other circuits: *Sparta Ceramic Co.* v. *United States*, 168 F. Supp. 401 (N.D. Ohio), pending in the Sixth Circuit; *Pacific Clay Products* v. *United States* (S.D. Cal.), decided October 30, 1958 (3 A.F.T.R. 2d 873), pending in the Ninth Circuit; *California Portland Cement Co.* v. *Riddell* (S.D. Cal.), decided November 21, 1958 (3 A.F.T.R. 2d 438), pending in the Ninth Circuit. Another case is pending in the Eighth Circuit (*Centropolis Crusher Co.* v. *Bookwalter*, 168 F. Supp. 33 (W.D. Mo.)), but may be controlled by the same court's decision in *Commissioner* v. *Iowa Limestone Co.*, *supra*.

[7] See Appendix C, Table III, *infra*, p. 41. The three tables which appear in this appendix were prepared by the

able to their competitors in the same mining operations who do not engage in manufacturing. The result, we believe, is to distort beyond recognition the statutory concept of depletion for mining, and to defeat the basic Congressional purpose in granting the deduction; and the holding below is at odds (although there is no direct conflict on the precise issue involved) with decisions of this Court which define and apply that concept.

B. The impact on the revenue is enormous. The direct loss which would result if the principle declared below were applied to the 380 claims already pending administratively or in the courts[8] would amount to approximately $297,000,000.[9] But this loss would unquestionably be small as compared to the ultimate loss of revenue which may be anticipated. As a result of the decisions in the Seventh and Eighth (see note 6, *supra*) Circuits, claims for past years will doubtless multiply. And, should the holding below be followed generally; the loss for the current tax year and for future tax years is con-

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Department of the Treasury and were submitted to the House Ways and Means Committee by Mr. David A. Lindsay, then Assistant to the Secretary of the Treasury. Hearings on the Legislative Proposal Of The Treasury Department Specifying The Treatment Processes Which Shall Be Considered Mining For The Purpose Of Computing Percentage Depletion In The Case Of Mineral Products, 86th Cong., 1st Sess., pp. 11-13. As to the purposes of the Treasury's legislative proposal, see note 19, p. 14, *infra*.

[8] Litigation is now pending in over 100 cases.

[9] Appendix C, Table I, p. 39, *infra*.

servatively estimated by the Treasury Department at approximately $598,000,000 per annum.[10]

C. No less important than the effect upon the federal revenue is the impact that the decision will have upon our competitive economy. The tax benefits to certain miner-manufacturers will be enormous for they will be enabled, like the taxpayer in this case, to take mineral depletion upon the basis of the price of an expensive, manufactured product. Competitors will suffer discrimination.

(1) Competing miner-manufacturers, utilizing the identical minerals in their products, will be required to take depletion on the basis of a more primitive product because, so far as they are concerned, it may be demonstrable that they can (or do) profitably sell such a product. *Example*: Two producers, A and B, mine iron ore and convert it into pig iron. Two tons of iron ore, for which the market price is approximately $16.00, can be processed into one ton of pig iron, which commands a price of approximately $60.00. A, who has a low-cost mine and an efficient operation, sells iron ore *and* pig iron, both at a profit. B, who has a high-cost mine, cannot compete in the iron ore market, but does profitably sell pig iron. On these facts, the decision below means that A's depletion allowance for two tons of iron ore is 15 percent of $16.00 ($2.40) and B's allowance is 15 percent of $60.00 ($9.00). Thus, B, whose mine is high-cost and hence worth *less* than A's, obtains, as compensation for exhaustion of

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[10] Appendix C, Table II, p. 40, *infra*.

his mineral deposit, an allowance per ton which is almost four times that received by A.[11]

(2) Manufacturers who compete with favored miner-manufacturers will be at a serious disadvantage. As the above example indicates, a miner-manufacturer who obtains depletion on the basis of a costly finished product receives what is in substance a sizable manufacturing subsidy. On the other hand, a processor of iron ore who purchases the ore from an independent source receives none.

(3) There will be widespread and gross discrimination as between integrated and non-integrated miners. *Example: This case.* Taxpayer mines fire clay and shale. It does not sell it as such (although, as the court below found, there is "a substantial market for fire clay and shale" (App. A, *infra*, p. 23)) because of its "prohibitively high mining and transportation costs". (*Ibid.*) Instead, it uses the mineral to produce vitrified sewer pipe and certain other expensive products. Computing its depletion allowance on the basis of gross income from its sales of sewer pipe, etc., it obtains depletion allowances on fire clay and shale amounting to *$4.03* per ton.[12] Directly across the river from taxpayer,

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[11] This, of course, is not the outside limit. If B's economic situation were such that he could not profitably market pig iron, presumably he might claim depletion based on the sales price of a still more advanced product, *e.g.*, structural steel.

[12] The depletion rate for fire clay is 15 percent and that for shale 5 percent. Thus, on the basis of taxpayer's sales (during the taxable year) of $1,409,145.66 and the use

a miner extracted fire clay and shale (in the same taxable year) and delivered it to a local manufacturer for approximately *$1.40* a ton.[13] Taxpayer's theory, accepted by the decision below, yields it a depletion allowance (per ton) amounting to 288 percent of the *price* at which it could have bought the same quantity of mineral on the market.[14] What, by contrast, is the depletion allowance to which a non-integrated miner selling fire clay and shale at $1.40 per ton would be entitled? The answer: approximately *15 cents* per ton.[15] We submit that the tax laws, if construed to permit this kind of result,

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therein of 38,473 tons of fire clay and shale (60 percent of which was fire clay and 40 percent shale), taxpayer's depletion allowance would be computed as follows under the decision below:

$1,409,145.66 × 60% ÷ 23,084 × 15% = $5.49
(Depletion allowance per ton of fire clay)

$1,409,145.66 × 40% ÷ 15,389 × 5% = $1.83
(Depletion allowance per ton of shale)

Depletion allowance for one ton of mineral consisting of 60% fire clay and 40% shale ($5.49 × 60% plus $1.83 × 40%) = $4.03

[13] See R. 48, 205-212.

[14] As noted under (2), immediately above, a sewer pipe manufacturer who bought fire clay and shale on the open market would not be entitled to any allowance.

[15] Using the same 60-40 proportions in which taxpayer mined fire clay and shale, the depletion allowance is computed as follows:

60% of $1.40 × 15% + 40% of $1.40 × 5% = $.154

may well create an almost irresistible impulse to vertical integration.[16]

D. The rule adopted below is one which creates virtually insuperable administrative problems, although Congress was seeking "a simple, practical rule".[17] Under the decision below, the Commissioner is not authorized to determine the first (cheapest and most primitive) commercially marketable product made by the branch of the mining industry concerned. Rather, he must determine, each year, what products each integrated miner-manufacturer in the United States can, with the particular processes he applies and in the light of his individual facilities

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[16] Similar illustrations can be given for this and other branches of the mineral industry:

Another integrated miner-manufacturer who mines and uses fire clay and shale to make bathroom and floor tile is claiming depletion on the $169.00 it realized per ton of clay, which is over 50 times the depletion base of a non-integrated clay miner in the same area. *Sparta Ceramic Co.* v. *United States*, 168 F. Supp. 401 (N.D. Ohio), pending in the Sixth Circuit.

A company which mines salt, for which the sales price is about $10 a ton in bulk, is claiming depletion on the sales prices of the salt in the various forms in which it is marketed, including 4 oz. containers selling at about $1,800 a ton. *Morton Salt Co.* v. *United States* (C. Cl., No. 142-58).

A gypsum company which has succeeded in establishing that gypsum is to be deemed "stone" for depletion purposes (*U.S. Gypsum Co.* v. *United States*, 253 F. 2d 738 (C.A. 7th)), is now pressing a claim that the allowance on its "stone" is to be computed on the basis of the proceeds received from sale of manufactured wall board. ~~*Id.*, N.D. Ill., Civ. No. 53 811.~~

[17] *United States* v. *Merry Brothers Brick & Tile Co.*, 242 F. 2d 708, 711-712 (C.A. 5th); certiorari denied, 355 U.S. 824.

and costs, sell at a profit. The difficulties of such investigation and prognosis (involving technology, cost accounting, market conditions, etc.) are so formidable that in most instances the Commissioner, as a practical matter, would have no choice but to presume that the finished products actually manufactured by an integrated producer are the only ones which he could profitably market.

2. The decision below plainly misconstrues the controlling statutory provision and destroys the fundamental theory of the depletion allowance.

A. At the outset, it may be noted that, although the statutory provision in question is the same one which was involved in *United States* v. *Merry Brothers Brick & Tile Co., et al.*, October Term 1957, No. 220, certiorari denied, 355 U. S. 824, the issue is entirely distinct.

The depletion allowance is set forth in terms of a stated percentage of the gross income from mining (Section 114(b)(4)(A), (B), App. B, *infra*, pp. 33-36). The statute then defines "mining" to include "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products * * *" (Section 114(b)(4)(B). This poses two problems: (1) What is included in the phrase "ordinary treatment processes"? (2) How does one determine the identity of the "commercially marketable mineral product"? The first question was involved in the prior set of appellate decisions which led to the filing of a petition for

certiorari in *Merry Brothers*.[18] The second question is presented here.

The issue litigated in *Merry Brothers* and companion cases may be briefly restated. The mine operators involved in those cases extracted brick and tile clay (to be distinguished from fire clay) and made it into brick. It was admitted or assumed that there was no commercial market for brick and tile clay as such. The question therefore was whether all of the various processes used in making clay into brick were "ordinary treatment processes" in the statutory sense. The Government's view was that this statutory term, read in light of the legislative history and prior administrative construction, had a gloss; that it covered only certain treatment processes—principally, purification and concentration processes—which were related to mining, though performed after the mineral had gone beyond the mouth of the mine; and that the term did not cover those processes which, though they were necessary for purposes of obtaining the marketable product, were essentially related to manufacturing rather than mining.

If that view had been accepted by the courts, the issue now presented would not have large importance.

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[18] At the same time, a petition for certiorari was also filed in *United States* v. *Dragon Cement Co., Inc.*, October Term 1957, No. 301, certiorari denied, 355 U. S. 833, which was the same in all relevant aspects. Other cases which involved the issue presented in *Merry Brothers* and *Dragon Cement* were *United States* v. *Cherokee Brick & Tile Co.*, 218 F. 2d 424 (C.A. 5th); *Townsend* v. *Hitchcock Corp.*, 232 F. 2d 444 (C.A. 4th); *United States* v. *Sapulpa Brick & Tile Corp.*, 239 F. 2d 694 (C.A. 10th).

for it would have been established that in all events manufacturing processes are not includable in gross income from mining. The Government's view of the scope of "ordinary treatment processes" was not accepted by the appellate courts.[19] As a result, it becomes of great importance to ascertain whether the term "commercially marketable mineral product" refers to the basic product marketed in the relevant branch of the mining industry (as the Government here contends) or whether (as held below) it permits each miner-manufacturer to claim depletion on the basis of the finished product which that manufacturer, in his particular operation, finds it profitable to make. This question, as the court below recognized (App. A, *infra*, pp. 24-25), is distinct from the issue litigated in the *Merry Brothers* type of case.[20]

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[19] At the last session of Congress, the Government proposed legislation which would specify for all minerals the processes which shall be treated as mining for the purpose of computing the amount of gross income derived from mineral extraction. The House Ways and Means Committee conducted hearings (see p. 7, note 7, *supra*) but has taken no further action to date.

[20] In *Commissioner* v. *Iowa Limestone Co.*, 269 F.2d 398, the Eighth Circuit agreed with the Seventh Circuit's conclusion that the courts are to ascertain the product which the individual taxpayer can profitably sell, and it allowed the taxpayer to take depletion on the basis of *pulverized* chemical grade limestone rather than on the basis of such limestone in *crushed* form. But the court also determined that chemical grade limestone in crushed form is not a marketable product. Although we believe that this determination was contrary to the evidence, we have concluded that the case is not an appropriate one for certiorari

B. The decision below cannot be squared with the statutory language. The statute speaks of the "*ordinary* treatment processes *normally* applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." It cannot be ordinary or normal for miners of fire clay—itself, a marketable product—to apply those processes which are used by manufacturers of sewer pipe; miners of fire clay are not ordinarily sewer pipe manufacturers. If the reference to "ordinary treatment processes normally applied by mine owners" was not designed to confine the depletion allowance to processes functionally related to mining—the view adopted by the Courts of Appeals in *Merry Brothers* and similar cases—there is only one possibility left, unless the statutory language is to be ignored: That Congress, at the least, meant to confine the allowance to the basic product sold by the particular mining industry.[21] The concept of ordinary processes

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because (1) the record on marketability is not well developed and (2) review would require this Court to re-evaluate an essentially factual issue.

[21] There is ordinarily no difficulty in designating the basic (least processed) marketable product derived from a particular mineral. The subject, in any event, lends itself readily to expert determination and to statement in appropriate regulations. It would, of course, remain necessary, in the event that a particular miner-manufacturer did not sell the mineral product in its least processed state, to prorate that operator's income. The pertinent Treasury Regulations have long provided the formulae for making that determination. See the Treasury Regulations applicable to the taxable year involved here (App. B, *infra*, pp. 36-38) and Treasury Regulations 77, Article 221.

The court below took the position that the individual tax-

normally applied by mine owners certainly must exclude the possibility that ten miner-manufacturers making ten different finished products from the same mineral can take a depletion allowance for that mineral on ten different bases.[22]

C. Our view of the statute is strongly supported by the fundamental theory upon which the depletion allowance rests; by the precept that tax laws are to be construed, so far as possible, to achieve a measure of uniformity; and by the history of the legislation.

This Court recently observed (*Parsons* v. *Smith*, 359 U. S. 215, 220) that the "purpose of the deduction for depletion is plain and has been many times declared by this Court." The allowance "is permitted in recognition of the fact that the mineral deposits are wasting assets and is intended as compensation to the owner for the part used up in production" (*ibid.*; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366); it makes possible "a recoupment of the owner's capi-

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payer may ignore the first commercially marketable product of the industry if he finds it unprofitable to market it in that form. But compare the holding of the Fifth Circuit in *Alabama By-Products Corp.* v. *Patterson*, 258 F. 2d 892, certiorari denied, 358 U. S. 930.

[22] Taxpayer can draw no comfort from the fact that the statute speaks of the processes used to obtain the "commercially marketable mineral product *or products*." The plural usage is but a recognition of the fact that one ore frequently yields more than one type of mineral. Section 114(b)(4)(B) explicitly recognizes this; subparagraph (iv) refers to the processes "used in the separation or extraction of the product or products from the ore * * *" (App. B, *infra*, p. 36).

tal investment in the minerals" (*Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 312). To be sure, to the extent that income attributable to essentially manufacturing processes comes to be included in the depletion base (the consequence of the *Merry Brothers* line of cases), an element foreign to the strict depletion concept is introduced. In *Merry Brothers*, that element, at least, was confined within determinate limits.[23] The claims for depletion which the Government currently faces are of a different order. What is involved here is not the question whether manufacturing processes are includable in the depletion base in situations where it is necessary to do some manufacturing to get the *first* commercially marketable product. What this taxpayer seeks to do is to ignore the *first* commercially marketable product (on the ground that it was not profitable for the Cannelton Sewer Pipe Company to sell fire clay) and to use the *last* marketable product (sewer pipe). As already observed, this approach makes the possibilities for "depletion" virtually limitless. In this case, which is by no means unusual or extreme as compared to other such cases (see note 16, p. 11, *supra*), the bizarre result is that a ton of fire clay assumes, for purposes of depletion, a value several times the market price of a ton of fire clay.

We have stressed the discrimination which neces-

[23] Further efforts to expand the depletion allowance were perhaps foreshadowed, even at that stage, by the fact that the Fifth Circuit's opinion suggested no distinction between the manufacture of common brick and the manufacture of more expensive varieties. See the Government's petition in *Merry Brothers*, October Term 1957, No. 220, p. 19, note 18.

sarlily results—discrimination as between different miner-manufacturers who make different products from the same mineral; as between miner-manufacturers and competing manufacturers; as between integrated mine owners and non-integrated miners (see *supra*, pp. 8-10). Certainly, it is familiar doctrine that the tax laws should be construed, where possible, to avoid, rather than create or promote, discrimination. "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be." *United States v. Gilbert Associates*, 345 U. S. 361, 364.

Legislative history confirms that Congress had no intention to authorize a scheme of depletion allowance whereby the measure of the allowance would fluctuate wildly from taxpayer to taxpayer within the same branch of the mining industry—a few cents per ton, for example, for a non-integrated miner of fire clay and a few dollars a ton for an integrated operator (*supra*, pp. 9-10). On the contrary, it appears that Congress was seeking an objective standard which could be simply and uniformly applied on an industry-wide basis, *i. e.*, without regard to the individual miner's degree of integration and without regard to the particular manufactured products which he, in his individual operation, might find it profitable to make. The percentage depletion method was originally chosen by Congress for its "simplicity and certainty in administration."[24] The report

[24] See S. Rep. No. 52, 69th Cong., 1st Sess., pp. 17-18 (1939-1 (Part 2) Cum. Bull. 332, 345-346), relating to Section 204(c)(2) of the Revenue Act of 1926, c. 27, 44 Stat. 16.

which accompanied the adoption (in 1943) of Section 114(b)(4) shows that Congress was thinking in terms of the treatment processes which would be used for each *kind* or *class* of mine.[25] It was stated further that the statutory definition of mining was "in accord with the original regulations and the Bureau practices and procedures thereunder." [26] The Regulations in question,[27] like those applicable here (App. B, *infra*, pp. 36-38), restrict the depletion base of all miners of the same mineral to the gross income from the same, single product.[28]

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[25] S. Rep. No. 627, 78th Cong., 1st Sess., p. 23 (1944 Cum. Bull. 973, 991).

[26] S. Rep. No. 627, *supra*, pp. 23-24 (1944 Cum. Bull. at 992).

[27] Treasury Regulations 77, Article 221.

[28] We also note that when the chief representative of the refractories industry requested Congress to add fire clay and certain other minerals to the list of those which would receive an allowance for depletion (a step taken by Congress in 1951), the proposal was made and explained on the assumption that the allowance would be computed on the basis of the value of the raw mineral product. See Revenue Revision of 1950, Hearings before the Committee on Ways and Means, 81st Cong., 2d Sess., pp. 453-456, 463-464.

CONCLUSION

We believe, for the reasons summarized above, that the question presented is one of great importance in the administration of the federal tax laws, warranting review by this Court. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1959

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1958—APRIL SESSION, 1959

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 12496

CANNELTON SEWER PIPE COMPANY,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

June 15, 1959

Before DUFFY, *Chief Judge*, HASTINGS and KNOCH, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Taxpayer, Cannelton Sewer Pipe Company, brought this suit in the district court for a refund of income tax paid in 1951. The sole question before us is what constitutes the proper basis for the computation of percentage depletion to which taxpayer is entitled. At all times relevant to this proceeding, taxpayer was engaged, near Cannelton, Indiana, in the mining of fire clay and shale and the manufacture of vitrified clay sewer pipe and related products. Under provisions of the Internal Revenue Code of 1939,[1] taxpayer was permitted a percentage depletion on its fire clay of 15% and, on its shale, of 5% of "the gross income from the prop-

[1] Reference to "the Code" in this opinion will be to the Internal Revenue Code of 1939.

erty during the taxable year * * *." 26 U.S.C.A. § 114(b)(4)(A) (1939 I.R.C.). The district court held that taxpayer could compute its deduction for depletion on the basis of its gross income from the sale of its finished products. The Government contends such holding is erroneous.[2]

Section 114(b)(4)(B) of the Code provided, in pertinent part, that:

> "The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the *ordinary treatment processes normally applied by mine owners or operators* in order to obtain the *commercially marketable mineral product or products* * * *." (Emphasis added.)

It is taxpayer's position that the processes by which it produced vitrified sewer pipe and related products from its raw fire clay and shale qualify as "ordinary treatment processes" within the meaning of the above statutory language since it had no market for its minerals in crude form and such processes were of necessity applied by it in order to obtain the first commercially marketable products. The Government urges that, in 1951, there was an existing substantial market for raw fire clay and shale in Indiana and in the area surrounding taxpayer's mine; and, that, in light of this fact, raw fire clay and shale were taxpayer's first commercially marketable products.

Taxpayer contends that the sole question on this appeal is whether there is substantial evidence to

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[2] There was also before the trial court a question whether or not taxpayer's clay was "fire clay" but the Government has not taken issue in this appeal with the trial court's finding that taxpayer's product met the specifications of fire clay.

support the trial court's finding that vitrified sewer pipe and other finished products were taxpayer's first commercially marketable products. We do not agree that the issues are so limited. An overriding consideration is whether the trial court applied the correct legal criteria in making such a determination. The record clearly bears out the Government's assertion that there existed in Indiana, during 1951, a substantial market for fire clay and shale. At the same time, it is also apparent from the record that taxpayer could not have sold its fire clay and shale in that market *at a profit* because of prohibitively high mining and transportation costs. The question squarely presented is thus whether the statutory language which defines, as a part of "mining", "all ordinary treatment processes normally applied by mine owners" to produce "the commercially marketable mineral product or products", includes all processes necessary by a taxpayer to obtain a product *which can be sold by it at a profit*. The Government urges that "mining" includes only the processes necessary for a taxpayer to produce a product which, with the least processing, is "marketable", *i.e.*, for which there is a market; and that it is not material whether or not it is economically feasible for a taxpayer to sell in that market. This theory presupposes that there would be a marketable or "depletable" product for each raw or crude mineral, and that the depletion allowance would be computed on this marketable or depletable product.[3]

[3] Section 29.23(m)-1(f) of Treasury Regulations 111 provides a method for the computation of the gross income as follows:

> "If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, 'gross income from the property' means the amount for

The Government has attempted, in a number of cases and with conspicuous lack of success, to limit the scope of the definition of mining contained in Section 114(b)(4)(B) here before us. Courts of Appeals in four different federal judicial circuits have uniformly and unhesitatingly rejected such endeavors to narrow the application of the provision's language. In *United States* v. *Cherokee Brick & Tile Company*, 5 Cir., 218 F. 2d 424 (1955) the Government urged unsuccessfully that since burnt brick and tile were *manufactured* rather than *mineral* products, the processes by which raw brick and tile clay were transformed into burnt brick and tile could be no part of mining for depletion purposes. The Court of Appeals for the Fifth Circuit held that the processes used to produce the burnt brick and tile were the ordinary treatment processes needed to produce the first commercially marketable products. That court has since reaffirmed its holding in the *Cherokee* case

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which such product was sold, but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, 'gross income from the property' means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied, before transportation of such product (other than transportation treated, for the taxable year, as mining). If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation (other than transportation treated, for the taxable year, as mining) and the processes beyond the ordinary treatment processes. * * *"

in *United States* v. *Merry Brothers Brick & Tile Company*, 5 Cir., 242 F. 2d 708 (1957) and, indeed, therein expressly rejected the Government's request that, upon reconsideration and re-examination, it should reverse its previous ruling. The Court of Appeals for the Tenth Circuit, citing the *Cherokee* case, similarly held against the Government in a case also involving brick and tile clay. *United States* v. *Sapulpa Brick and Tile Corporation*, 10 Cir., 239 F. 2d 694 (1956). In *Dragon Cement Company* v. *United States*, 1 Cir., 244 F. 2d 513 (1957), the Government contended that cement was a manufactured product which was chemically different in composition from the depletable product, cement rock, and that, therefore, the taxpayer could not use the gross income from sale of cement as its basis for computing percentage depletion. This was rejected by the Court of Appeals for the First Circuit. Finally, in *Townsend* v. *The Hitchcock Corporation*, 4 Cir., 232 F. 2d 444 (1956), it was held that the grinding and bagging of talc and the cutting of talc into crayons were ordinary treatment processes by which mine owners obtained the commercially marketable products, even though the final products were manufactured.

In all the above cases, the Government's basic contention was that manufacturing processes could not be "ordinary treatment processes" within the meaning of the Code. Likewise, in each of these cases, the Government readily admitted that each taxpayer had no market, or a market for only a negligible quantity, of the particular raw mineral involved; but urged that this fact was of no consequence since the overriding consideration was that depletion could not be allowed on the sale of manufactured products.

That argument has definitely been laid to rest; the Government has not renewed it before this court.

The courts in the above cases uniformly held that the prime consideration was whether taxpayer applied the normal processes necessary to produce the first commercially marketable product, even though what are usually considered manufacturing processes were applied; and the question was treated as one of fact.[4]

The Government contends that the trial court misinterpreted the above cases as holding that a taxpayer could take depletion on its finished product regardless of whether it was the first commercially marketable product. As it points out, in this case it did not admit the nonmarketability of fire clay and shale. Indeed, the Government's evidence indicates that large quantities of fire clay and shale were sold during the tax year, 1951. Thus, in Indiana, of 82 companies engaged in the production or consumption of fire clay and shale, 32 purchased fire clay or shale, or both, for use in their manufacturing operations. Seven producers of fire clay and two producers of shale in Indiana engaged in nonintegrated operations, that is, strictly in the extraction of the raw fire clay and shale and not in further processing.

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[4] The Court of Appeals for the Fifth Circuit stated in *United States* v. *Cherokee Brick & Tile Company*, *supra* at 425, that:

> "* * * [T]he crucial point in this case is one of fact, not of law; and the pleadings admit that fact to be against the Government.
>
> * * *
>
> "The complaint alleges that, of the brick and tile clay mined in the United States, there is opportunity for the sale of only a negligible quantity before it is put into the form of burnt brick and tile. This allegation is admitted in the answer of the appellant. For this and other reasons (but mainly for this one) stated in the opinion of the district court, * * * the judgment appealed from should be affirmed."

These companies necessarily took depletion on the raw fire clay and shale which they sold. Taxpayer's own expert witness, Haydn H. Murray, admitted, on cross-examination, that over 300,000 short tons of fire clay (of some 500,000 short tons produced) were sold in Indiana in 1951 rather than used by the producer in integrated manufacturing operations.

The taxpayer points out that a good percentage of the clay and shale, actually sold, was sold in the Brazil, Indiana area at prices ranging from $1.60 to $1.90 per ton delivered in the Brazil area. Taxpayer's mining costs alone, ignoring for the moment the transportation costs which would be an added expense if it sought to sell its raw clay and shale, amounted to $2.41 per ton. Those companies selling fire clay in Indiana concerning which the Government introduced evidence fall into two categories. There are those operators who engage primarily in strip mining of coal and, who, during their operations, strip bare so-called underclay which they sell as a by-product. Secondly, there are those which mine underclay which has already been laid bare by previous strip mining operations. The mining costs of such operators would be considerably below those of taxpayer which operated an underground mine. Further, several of the operators of those mines discussed above could not find a market for all the clay which they had available for sale.

We agree with the taxpayer that it did not have a *commercially* marketable product in its fire clay and shale. We are unable to accept the theory that a taxpayer's depletion allowance is to be computed on the basis of a representative market or field price for a product which taxpayer could not sell at a profit. To do so would be to deprive of all meaning the words "commercially marketable" as used in the

Code provision here considered.[5] The integrated operations of taxpayer in this case (that is, combined mining and manufacture) were certainly not unique. The evidence the Government used to establish the existence of a market for taxpayer's fire clay indicates, in fact, that the integrated miner-manufacturer was the rule rather than the exception in Indiana, in 1951. The fact that certain operators of strip mines found it economically feasible to extract

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[5] In *Arvonia-Buckingham Slate Company* v. *United States*, D.C. E.D. Va., 167 F. Supp. 903 (1958) the district court was faced with and rejected the contention that taxpayer involved had a marketable product in unprocessed slate even though the record showed that it was economically unfeasible for taxpayer to mine slate suitable for sale at a profit until it processed the slate into roofing slate shingles. The nature of the seam which taxpayer worked made it necessary for it to blast the slate free and the waste slate, consisting of pieces unsuitable for shingles, sold for only ten cents a ton. In *Riverton Lime and Stone Co*, v. *Commissioner of Internal Revenue*, 28 T.C. 446, 448 (1957) the Tax Court held that hydrated limestone was taxpayer's first commercially marketable product for [w]hile it may have been possible to use petitioner's limestone in its quarried state for agricultural purposes, petitioner could not, and did not, sell it in this market because of the abundance of other limestone in the area which was chemically more suited to the farmers' needs." The Government points out in its brief that appeals are now pending from similar adverse holdings in the following cases: *Iowa Limestone Co.* v. *Commissioner*, 28 T.C. 881 (1957), now pending on appeal to the Eighth Circuit and involving the question of whether crushed rather than pulverized limestone is a taxpayer's first commercially marketable product; *Sparta Ceramic Company* v. *United States*, D.C.N.D. Ohio, 168 F. Supp. 401 (1958), on appeal to the Sixth Circuit and involving fire clay; and *Pacific Clay Products* v. *United States*, (S.D. Calif.), decided October 30, 1958, on appeal to the Ninth Circuit and involving both fire clay and brick and tile clay.

and sell fire clay primarily in a limited area near Brazil, Indiana does not alter this picture. Finally, there is no contention that taxpayer applied other than ordinary treatment processes in obtaining its finished products.

In line with its theory that there must be one depletable or commercially marketable product for each mineral, the Government urges that if raw fire clay and shale are not those products for this taxpayer, this case should nevertheless be remanded for further evidence to determine if some other products could have been, with much less processing, the depletable products for this taxpayer. It is suggested that such products could be common brick and ground fire clay.[6] The short answer to this is that we do not agree that it was intended that the depletion allowance for each mineral be reduced to the common denominator represented by a conceivable product most cheaply produced from each mineral. In *United States* v. *Cherokee Brick & Tile Company*, *supra*, and *United States* v. *Sapulpa Brick and Tile Corporation*, *supra*, the Fifth and Tenth Circuits, respectively, allowed depletion on both *brick* and *tile*. In *Townsend* v. *The Hitchcock Corporation*, *supra*, both *talc powder* and *talc crayons* were treated as depletable products.

This is not to say, of course, that a product may be processed beyond the stage at which it is a commercially marketable product. In *Sparta Ceramic Co.* v. *United States*, D.C.N.D. Ohio, 168 F. Supp. 401 (1958), the district court recognized this limitation when it refused to allow depletion on the basis of gross income from sales of glazed tile rather than

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[6] There was evidence that taxpayer did sell some 80 tons of ground fire clay at a little more than twenty dollars per ton.

on the representative market price of the unglazed product. Although glazing was accomplished at the time the tile was burnt, about 65% of taxpayer's end product was unglazed and was, in fact, commercially marketable. As the court pointed out, glazing could no more be a necessary treatment process than gold plating, should taxpayer seek to enhance the value of the product by such means. As we have indicated, there is no contention here that the instant taxpayer applied other than normal treatment processes in obtaining its finished products.

The Government relies on *Riverton Lime and Stone Co.* v. *Commissioner of Internal Revenue*, 28 T.C. 446 (1957) as authority for the proposition that a small market can establish a representative market or field price for a product. However, in that case it was held merely that, although there were only a few sales of hydrated hydraulic lime in the pure state, the taxpayer could compute its gross income on the market price of that product. Most of taxpayer's sales were of an admixed product rather than a pure product and the Commissioner contended that gross income should be computed on the admixed product by the proportionate profits method[7] since the limited market for pure lime established no representative market or field price for pure lime. That case has no bearing on the problem before us since taxpayer here could not and did not sell its raw fire clay or shale prior to processing.

We find nothing in the opinion in *Alabama By-Products Corporation* v. *Patterson*, 5 Cir., 258 F. 2d 892 (1958) recently handed down by the Court of Appeals for the Fifth Circuit to indicate that that court has modified its earlier holdings in the *Chero-*

[7] See Section 29.23(m)-1(f) of Treasury Regulations 111, *supra* note 3.

kee and *Merry Brothers* cases. The court merely recognizes in footnote 12 on pages 899-900 of that opinion that neither of those cases involved a question of the existence of a representative market price since in both cases the Government had admitted nonmarketability of the crude brick and tile clay.

The decision of this court in *Zonolite Co.* v. *United States*, 7 Cir., 211 F. 2d 508 (1954) relied upon by the Government is not controlling here. In that case we held only that income received by taxpayer for transporting its mineral product from the mine to place of sale was not includible in the gross income from "mining." In other words we held that such transportation was beyond ordinary treatment processes since taxpayer's product was a commercially marketable product before such transportation costs were incurred. The holding in the instant case is entirely consistent with that decision.

The judgment of the district court is

AFFIRMED.

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* As the taxpayer points out in its brief, at the time the Government appealed from the district court's holding in the *Merry Brothers* case to the Court of Appeals for the Fifth Circuit, the Government stipulated that five other clay and shale cases should be affirmed if the court adhered to its ruling in the *Cherokee* case. Three of those involved fire clay.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Monday, June 15, 1959

Before

Hon. F. RYAN DUFFY, Chief Judge
Hon. JOHN S. HASTINGS, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 12496

CANNELTON SEWER PIPE COMPANY,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * *

(b) *Basis for depletion.*—

* * * *

(4) [as amended by Sec. 145 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 319(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Percentage depletion for coal and metal mines and for certain other mines and natural mineral deposits.*—

(A) *In general.*—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, *shale*, oyster shell, clam shell, granite, marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum,

* * * *

(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and *fire clay*, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum * * *

* * * *

of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23 (m) be less than it would be if com-

puted without reference to this paragraph. [Italics supplied.]

(B) [as added by Sec. 124(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by Sec. 207(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 304(d) of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137] *Definition of gross income from property.*—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining" as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills. The term "ordinary treatment processes", as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, break-

ing, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of crude mineral product — crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining) or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 450 and 453.

* * * *

(26 U.S.C. 1952 ed., Sec. 114.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1 [as amended by T.D. 5413 (1944 Cum. Bull. 124) and T.D. 6004 (1953-1

Cum. Bull. 45]. DEPLETION OF MINES, OIL AND GAS WELLS, OTHER NATURAL DEPOSITS, AND TIMBER; DEPRECIATION OF IMPROVEMENTS.—

* * * *

(*f*) The term "gross income from the property," as used in sections 114(b)(3) and 114 (b)(4)(A) and sections 29.23(m)-1 to 29.23 (m)-28, inclusive, means the following:

* * * *

If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, "gross income from the property" means the amount for which such product was sold, but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, "gross income from the property" means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied, before transportation of such product (other than transportation treated, for the taxable year, as mining). If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation (other than transportation treated, for the taxable year, as mining) and the processes beyond the ordinary treatment processes. For a description of transportation

which is treated, for taxable years beginning after December 31, 1949, as mining, see the preceding paragraph and section 114(b)(4)(B), as amended.

* * * * *

APPENDIX C

TABLE 1

Total potential tax loss resulting from the extension of percentage depletion to manufactured products as reflected in cases currently in litigation or pending administratively

Mineral	Number of cases	Potential tax loss										
		Total	Unallocable by year	Allocable by year	1951	1952	1953	1954	1955	1956	1957	1958
Asbestos	1	(1)										
Bentonite	4	422,255	98,115	324,140	62,000	25,617	36,185	50,579	90,335	37,653	21,771	
Clay, brick & tile	80	14,428,395	1,031,819	13,396,576	1,111,190	1,062,302	1,575,466	3,139,458	2,339,058	2,609,043	1,458,302	101,757
Clay, brick and tile shale	2	27,639		27,639					9,294	9,732	7,925	688
Clay, fire	50	19,405,252	2,408,025	16,997,227	2,792,559	1,748,224	2,337,376	2,123,863	3,154,148	3,153,666	1,606,233	81,158
Clay, fire - brick and tile shale	10	1,843,887	39,746	1,804,141	208,215	166,065	185,800	271,989	319,800	375,276	276,996	
Coal	12	612,088	443,873	168,215			60,727	50,433	.....	28,992	27,511	552
Coal & Iron ore	2	9,566,675	.....	9,566,675	4,403,923 [2]	2,995,769	2,166,983	.....	.....	.....	.....	.....
Diaspore	1	(1)										
Diatomaceous earth	2	(1)										
Dimension stone	2	37,819		37,819					24,958	12,861	.....	.....
Dolomite	7	3,609,963	142,994	3,466,969	877,776	757,999	656,555	540,189	206,150	352,150	76,150	.....
Gilsonite	1	(1)										
Granite	7	506,511	191,000	315,511	37,285	86,229	51,666	63,316	44,439	15,696	16,880	.....
Gypsum	4	8,895,242	280,969	8,614,273	.....	.....	23,757	8,330,346	260,170	.....	.....	.....
Limestone	90	111,069,905	3,336,467	107,733,438	14,848,674	12,325,263	13,935,364	16,806,371	17,277,448	14,686,074	16,034,552	1,819,692
Limestone - clay/shale	22	84,567,281	2,694,463	81,872,818	8,124,905	12,326,284	12,507,148	12,575,815	15,122,815	11,540,485	9,455,366	220,000
Limestone and dolomite	4	881,728	881,728									
Oil and gas	6	1,476,789	18,845	1,457,944	.....	99,641	65,666	142,497	340,047	396,598	413,495	.....
Quartzite	8	1,583,374	473,296	1,110,078	95,921	315,893	132,881	225,673	197,346	65,677	68,220	8,469
Rare minerals	3	527,183	.....	527,183	.....	546	678	22,548	.....	253,327	250,084	.....
Salt	14	11,186,529	208,884	10,977,645	1,495,911	1,594,561	1,662,583	1,861,120	1,858,705	1,977,855	451,910	75,000
Sand and gravel	16	640,948	92,268	548,680	12,299	126,627	165,089	126,804	103,259	48,852	750	.....
Sandstone	5	245,454		245,454	.....	55,880	59,992	66,390	32,407	21,385	9,400	.....
Shale	9	565,819	60,809	505,010	42,634	229,663	99,738	70,036	39,053	19,169	4,717	.....
Shells	2	88,656		88,656	16,095	30,052	17,800	11,481	13,228	.....	.....	.....
Stone	2	138,129	138,129									
Stone, crushed	4	847,700	538,417	309,283	35,000	67,552	68,284	72,361	66,086	.....	.....	.....
Deposits containing various minerals used in production of diverse chemical products	10	21,819,825		21,819,825	5,730,727	4,734,280	3,644,899	2,638,511	2,532,638	1,557,945	980,825	.....
Mineral items that cannot be disclosed		1,953,010	1,807,640	145,370	145,370							
TOTAL	380	296,948,056	14,887,487	282,060,569	40,040,484	38,748,445	39,454,637	49,214,738	44,019,287	37,114,575	31,161,087	2,307,316

[1] Figure withheld to avoid disclosing individual company confidential data, value included with "Mineral items that cannot be disclosed."

[2] Includes $1,736,390 allocable to 1947-1950.

TABLE II

Annual potential tax loss resulting from extension of percentage depletion to designated manufactured products for 19 mineral categories

(All dollar figures are in thousands of dollars)

Mineral	Manufactured product or products	Depletion rate on mineral	Mineral production [1] (Thousands of tons)	Value, [1] mineral	Estimated value product manufactured	Difference in value	Estimated increase in the depletion deduction [4]	Estimated tax differential [5]
Bauxite	Aluminum	23 [2]	6,743	$ 45,852	$ 716,444	$ 670,592	$ 114,001	$ 59,281
Bentonite	Clay products	15	1,571	18,415	55,245	36,830	5,524	2,872
Clay, brick & tile	Brick & Tile, Other products	5	34,385	41,316	145,306	103,790	5,190	2,699
Clay, fire	Refractory Clay products	15	11,803	53,750	208,608	154,858	23,229	12,079
Clay & shale	Cement	15 & 5 [3]	9,067	9,302	87,954	78,652	7,865	4,090
Diatomaceous Earth	Filtration, filler, insulation, misc.	15	250	2,282	7,740	5,458	819	426
Fullers Earth	Mineral oils, absorbent uses, other	15	418	8,879	13,318	4,439	666	346
Granite	Building stone	15	29,636	65,447	229,065	163,618	24,543	12,762
Gypsum	Building board and plaster	15	14,652	41,913	321,652	279,739	41,961	21,820
Iron ore	Steel	15	96,730	749,657	4,804,450	4,054,793	608,219	316,274
Kaolin	Paper filling & coating, other	15	2,250	34,504	51,756	17,252	2,588	1,346
Limestone	Cement	15	81,008	85,230	785,774	700,544	105,082	54,643
Limestone	Lime	15	10,577	14,660	135,727	121,067	18,160	9,443
Salt	Chlorine, Soda ash	10	14,565	45,876	339,994	294,118	29,412	15,294
Sand & Gravel	Road construction	5	624,697	595,161	3,570,606	2,975,505	148,775	77,363
Sandstone	Finished stone	15	13,447	33,998	46,388	12,390	1,858	966
Marl, slag, gypsum, etc.	Cement	5	11,901	11,901	115,440	103,539	5,177	2,692
Stone	Rough construction	5	62,925	109,339	218,678	109,339	5,467	2,843
Talc	Ceramics, Paints, filler, insectidites, other	15	739	4,859	15,026	10,167	1,525	793
Total							$1,150,061	$598,032

Note: Coal, Petroleum, Gas, and various other minerals are not represented because of insufficient data from which comparable statistics could be estimated.

[1] Production and crude value figures are either taken directly or derived from figures in the U. S. Bureau of Mines 1956 Mineral Yearbook.

[2] 23 percent is the depletion rate for the domestic production of bauxite. An assumed depletion rate of 17 percent is used to compute the estimated increase in depletion deduction. This is because approximately 70 percent of mined bauxite used in aluminum production is produced by U. S. manufacturers in the Caribbean area and subject to a depletion rate of 15 percent.

[3] It is assumed that equal tonnage of clay and shale is used in the production of cement; therefore, a 10 percent depletion rate is used to determine the estimated increase in depletion deduction.

[4] The figure for "Estimated Increase in Depletion Deduction" assumes that the net income limitation does not apply.

[5] The figure for "Estimated Tax Differential" assumes a corporate tax rate of 52 percent.

TABLE III

Claims of individual companies illustrating potential tax loss resulting from extension of percentage depletion to manufactured products

Mineral Deposit	Mineral Form Claimed for Depletion Purposes by Taxpayer	Year or Years Involved	Percentage Depletion Computed by Government	Percentage Depletion Computed by Taxpayer	Percent - Taxpayer to Government	Tax Differential
Bauxite	Aluminum Sulfate (Alum)	Unknown	$ 35,000	$ 232,420	664	$ 102,600
Bentonite	Caulking Clay	Unknown	39,600	95,400	241	29,000
	Caulking Clay	Unknown	31,700	109,600	346	40,500
Clay, Brick and Tile	Brick & Tile Products	1951-1956	59,359	523,931	883	240,345
	Brick & Tile Products	1951-1954	23,953	175,525	733	97,953
Clay, Fire	Fire Brick, Mortar	1953-1956	2,250,000	9,339,545	415	4,468,168
	Fire Brick, Structural Brick	1951-1953	350,000	1,773,291	507	717,220
Clay, Fire and Shale	Various Clay Products	1951-1954	44,019	537,779	1222	250,871
	Various Clay Products	1951-1953	9,786	123,720	1264	66,700
Coking Coal	Coke & By-products	Unknown	140,700	258,000	183	83,100
Dolomite	Refractory Brick, Ground Dolomite	1955-1956	312,459	844,485	270	276,549
Fullers Earth	Uncertain, Mineral Primarily Used as an Absorbent or as Rotary Drilling Mud	Unknown	214,723	344,148	160	67,300
Granite	Building Stone	1951-1957	96,375	438,525	455	177,907
	Monuments	Unknown	36,173	106,553	295	36,000
Gypsum	Wallboard, Plaster, & other Construction Uses	Unknown	2,125,000	12,815,000	603	6,783,900
Iron Ore	Steel	Unknown	2,000,448	12,002,688	600	5,001,165
Limestone	Lime	1953-1957	106,231	377,230	327	106,231
	Limestone & Chemical Plant (Specific Product Unknown)	1951-1953	8,064,000	37,680,000	467	19,268,000
Limestone	Cement	3 years	1,983,500	9,450,000	476	5,353,730
	Cement	1953-1956	919,923	2,931,060	319	1,045,790
Limestone & Shale/Clay	Cement	1951-1954	3,201,678	13,702,811	428	5,760,968
	Cement	1951-1955	1,506,248	4,009,901	266	1,020,192
Perlite	Abrasives & Aggregates	Unknown	2,570	15,527	604	3,535
Quartzite	Silica	1954-1955	169,035	711,523	421	288,175
Salt Brine	Chlorine & Caustic Soda	3 years	857,874	11,555,640	1347	6,633,876
	Salt & Salt Products	4 years	1,770,498	8,290,912	468	3,260,207
Sandstone	Silica Products	1951-1955	70,169	243,923	348	111,181
Sand & Gravel	Construction Use	1953-1955	7,750	62,069	801	28,540
	Construction Use	1953-1955	10,315	93,935	911	43,763
Shale	Tile	1951-1954	11,805	214,585	1818	104,827
Shells, Oyster/Clam, Etc.	Road Construction	1951-1953	78,612	171,620	218	63,962
Solite	Light-weight Aggregate	Unknown	100,000	312,000	312	114,000
	Light-weight Aggregate	Unknown	8,080	26,779	331	8,725
Stone, Crushed	Rough Construction	3 years	1,730,484	3,508,283	203	924,500
	Rough Construction	2 years	8,667	43,595	503	17,500

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